Wills Variation and Blended Families: The New Reality

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I. INTRODUCTION

The provisions of the *Wills Variation Act* RSBC 1996 c. 490 ("*WVA*") which were repealed on March 31, 2014 and substantially re-enacted, in their former state, under Part 4, Division 6 of the *Wills Estate and Succession Act*, SBC 2009, c. 13 ("*WESA*"). The variation provisions to *WESA* continue to provide some special and arguably greater challenges for blended families than the traditional nuclear family (defined as a husband and wife in a single marriage for each, with all children of both being the children of the couple), which is becoming less the norm. Providing variation rights to spouses and children who are not related to each other by blood, although they are related to the will-maker, presents challenges to the courts when, under the variation provisions, they are seeking to balance the respective and competing rights, entitlements and interests.

This paper should be read in conjunction with two prior papers I have written on this topic for this same CLE course, in May 2006 and May 2010. I will not repeat analysis on the basic and leading variation cases involving blended families that are discussed in the earlier papers.

II. KEY WILLS VARIATION CHALLENGES IN *WESA*

There have been some changes to the variation provisions in WESA that affect procedural issues. However, the changes to the definition of spouse provide the most significant substantive change to the variation provisions. The key changes are highlighted below.

A. Limitation Periods for Commencing and Serving Claim

The limitation period for commencing a wills variation claim under the *WVA* was six months whereas under the *WESA*, that time period is slightly reduced to 180 days after the issuance of the grant of probate: s. 61(a). In addition, unless the court otherwise orders, the Notice of Civil Claim must be served on the executor no later than 30 days after the 180 day limitation period for filing a claim expires: s. 61(b).

Under section 155 of the *WESA*, the executor must wait 210 days before distributing the estate, which dovetails with the new limitation periods under the *WESA* (180 days to commence a claim and another 30 days to serve the executor with the claim). Where an executor has made distributions before being entitled to do so, even though done in ignorance of the statutory provision, the court has held that the executor must personally repay the distributed funds back into the estate or post security for amounts distributed prior to the permissible period (see *Stevens v. Wood Estate*, 2013 BCSC 2380).

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[1] The author gratefully acknowledges the assistance of Nicco Bautista, of Fasken Martineau DuMoulin, with this paper.

B. Filing of Certificates of Pending Litigation

Another change in the *WESA* is with respect to the filing of a Certificate of Pending Litigation (a "CPL"). Under the *WESA*, there is no longer a requirement to file a CPL over property in an estate as that is now optional, at the choice of the plaintiff: s. 61(5) of the *WESA*. If, however, the applicant chooses to register a CPL against the title to the Deceased's land, and potentially make a claim to an asset *in specie*, the registration must be done within 10 days of the filing of the Notice of Civil Claim.

C. Prohibition Period for Distribution

If there are no proceedings commenced that affect the distribution of the estate (such as a variation claim or a determination of whether an individual is a beneficiary or intestate successor of the estate), a distribution can only be made prior to the 210 day period if all of the beneficiaries and intestate successors who are interested in the estate consent. In circumstances where unanimous consent cannot be obtained, an application can be made to the court for such an order (see: *Henney v. Sander*, 2014 BCSC 889).

If proceedings have been commenced then, pursuant to subsection 155(2) of the *WESA*, no distributions can be made without the consent of the court.

Another change created by the *WESA* is the ability for the use of multiple wills in an estate plan. If there are multiple wills and only one is being probated, that could create some uncertainty with respect to protections for an executor under the non-probate will who is distributing the estate governed by the non-probate will. By not probating, the 180 day limitation period for bringing a claim for a variation of that will would never be triggered and a claim remains alive in relation to the assets passing under the non-probate will. Further, there would be no expiry of the 210 day period on prohibition against distribution, such that a distribution after the 210 days would protect the executor on the distribution. The fact that there is no expiry of a limitation period for varying the non-probate will leaves the possibility of the executor and the beneficiaries thereunder being potentially exposed for an indefinite period.

If a variation claim is brought in an estate where a will is probated, it is possible that the variation claim would force the second will that was intended not to be probated, to also be probated. This could be done by the claimants compelling the Executor to probate the non-probate Will. This would of course upset the probate fee planning intended by the use of multiple wills but more importantly, it would subject all assets of the will-maker, regardless of the Will, to the variation claim.

D. Definition of Spouse

The *WESA*, when read together with the *Family Law Act*, S.B.C. 2011, c. 25 ("*FLA*"), changes who qualifies as a spouse for advancing a wills variation claim. Under the *WVA*, it was possible to have two persons claiming as the testator's spouse. The definition of spouse under the *WESA* lends itself to a will-maker having only one spouse at any given time.

Section 2 of the *WESA* provides as follows:

> **When a person is a spouse under this Act**
>
> **2** (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and
>
> (a) they were married to each other, or
>
> (b) they had lived with each other in a marriage-like relationship for at least 2 years.
>
> (2) Two persons cease being spouses of each other for the purposes of this Act if,
>
> (a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the Family Law Act, to arise, or
>
> (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.
>
> (2.1) For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,
>
> (a) they begin to live together again and the primary purpose for doing so is to reconcile, and
>
> (b) they continue to live together for one or more periods, totalling at least 90 days.

Two persons are spouses of each other for the purpose of the *WESA* if they were both alive immediately prior to the will-maker's death and they were married or had lived in a marriage-like relationship for at least the two preceding years. This is not a change from the former *WVA*.

However, the change in the *WESA* to the definition of spouse is in relation to the cessation of spousal status. Under s. 2(2)(a) of the *WESA*, married spouses cease to be spouses if "an event occurs that causes an interest in family property, as defined in the *FLA*, to arise".

Section 81(b) of the *FLA* addresses when an interest in family property arises, namely on separation. Section 81 provides:

> **Equal entitlement and responsibility**
>
> **81** Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

(a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

(b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

Separation ends a spousal relationship, even where the parties remain married. For a marriage-like relationship, the termination of the marriage-like relationship ends the spousal status.

Previously, under the *WVA*, a legally married but separated spouse still had standing to apply for the variation of the deceased spouse's will. The length of the separation and the division of property rights upon separation are factors that may affect the award but they did not bar a claim. Now, under the *WESA*, as soon as property division rights arise under the *FLA* (which in other words, on separation), a previously qualified spouse automatically loses the right to apply for a variation of the will-maker spouse's will.

There is no definition of separation *per se*, or a statement of what constitutes separation, under the *FLA*. Subsection 3(4) of *FLA* however provides as follows:

Spouses and relationships between spouses

3(4) For the purposes of this Act, …

(a) spouses may be separated despite continuing to live in the same residence; and

(b) the court may consider, as evidence of separation,

(i) communication, by one spouse to the other spouse, of an intention to separate permanently, and

(ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

It appears that the intention of permanency of separation held by one spouse alone is sufficient to triggers the ability of the spouses to make a claim for the division of family property under the *FLA* and as a result, the existence of the intention by one spouse ends the entitlement of the surviving spouse to be a claimant under the *WESA* for a will variation.

Subsection 2(2.1) of the *WESA* does expressly allow for reconciliation after separation. Therefore, if the spouses who have separated live together for at least 90 days prior to death of one spouse, with the primary purpose being to reconcile, they effectively re-qualify as spouses. This provision is a codification of the principle that reconciliation should defeat separation, as recognized by the court in *Tran v. Novix,* 2003 BCSC 2032.

One of the tasks for an executor will be to determine if a person qualifies as a spouse and if notice under s. 121 of the *WESA* must be given to that person. Determining if parties are spouses has always been challenging. Even where the will identifies a person as a "friend," the court may find the friend to be a spouse: ***Griese v. Syvret*** 2013 BCSC 1601. It may be difficult in some cases for an executor to make that assessment, particularly given that separation is a factual test. However, if the executor fails to give notice to a person who might qualify as a spouse, then the wills variation limitation period would not start to run if the person is found to be a spouse. A distribution by an executor in those circumstances might not provide the executor with the statutory protection of distribution after 210 days.

As can be seen from the case below, the determination of spousal status is an exercise that is very dependent on the assessment of the specific circumstances of the particular relationship. The case law that was decided under the *WVA* related to finding a marriage-like relationship and when separation occurs, should continue to be applicable, under the *WESA*, in addition to the cases decided under the *FLA*.

In ***Richardson Estate (Re)*** 2014 BCSC 2162, a case decided under the *WESA*, the applicant for a grant of administration asserted that she was the common law spouse of the deceased, over the objections of the deceased's brother. The court found that spouses do not need to cohabit in the same home in order to be found to be in a marriage-like relationship. In *Richardson*, the couple each maintained separate residences in different cities. However, the court found other indicia of a marriage-like relationship, including: the applicant gave advice to the deceased about his finances; the applicant was named as a beneficiary of a RRSP and investment account of the deceased; the couple had an intimate relationship spanning 15 years; the applicant and the deceased presented themselves as a couple and the community accepted them as an exclusive couple; and there was some financial comingling between them. The court attributed the lack of cohabitation in a single residence to the necessity of the couple to attend to work and family obligations in different cities.

III. CHANGES TO WILLS VARIATION LAW DUE TO THE *FLA*

The most significant change to the law of wills variation is not as a result of any amendments to the *WVA* provisions in the *WESA*. Rather, it is as a result of the former *Family Relations Act* RSBC 1996, c. 128 ("*FRA*") having been replaced by the *FLA*.

Tataryn v. Tataryn Estate, [1994] 2 S.C.R. 807 is the leading case guiding the exercise of the court's discretion under the s. 2 of the *WVA* (now s. 60 of the *WESA*). The Supreme Court of Canada held that a testator was required to meet the legal and moral obligations that he owed to the claimant spouse or child. In determining the legal obligation owed to a spouse, the court directed that judges have regard to the legal obligations owed by a testator to the surviving spouse under applicable divorce and family law property division legislation.

When the former *FRA* was in force, only married spouses had a right to a division of family assets whereas common law spouses were limited to spousal support under the legislation and to making equitable claims. Now, under the *FLA*, both married spouses

and those living in a marriage-like relationship are entitled to the division of family property on an equal footing.

Under the *WVA*, the legal obligations owed to a married spouse as opposed to those owed to a common law spouse differed, as reflected in the different rights under the *FRA* for married and common law spouses. Now spousal claims under the *WESA* will be treated in the same manner, regardless of whether the spouse was married to the will-maker or living in a marriage-like relationship with the will-maker, as both have the same family property division rights under the *FLA*. The previous impediment for a common law spouse to seek an outright share of the assets on a variation claim, as was noted by the court in ***Picketts v. Hall (Estate)***, 2007 BCSC 133; overturned 2009 BCCA 329, would no longer exist.

Furthermore, for all spouses, whether married or common law, the determination of the legal entitlement pursuant to the *FLA* is an entirely different exercise than that applicable under the *FRA*. The former analysis that was done (for example by the trial court in ***Saugestad v. Saugestad***, 2006 BCSC 1839, varied 2008 BCCA 38) would no longer be applicable. Rather, the court on a spousal variation claim will now need to apply the provisions under Part 5 of the *FLA* and divide the value of family property, taking into account the various factors (such as excluded property under s. 85) and other provisions (such as family debt under s. 86) that govern property division.

It is now very possible under the *FLA*, that a spousal relationship be of considerable length but there is very little property division available to the non-titled spouse because the assets brought into the relationship by the titled spouse did not increase in value over the course of the relationship. Therefore, the legal obligation owed under the *FLA* may be limited to spousal support but no asset division (which was effectively the situation that governed common law spouses under the *FRA*). This fact may affect how the courts use the moral obligation component of the judicial discretion for a variation. Presumably, that would be a factor that would increase the moral obligation owed by the will-maker to the surviving spouse, notwithstanding that the legal obligation is very limited.

IV. BLENDED FAMILY CASES SINCE 2010

The cases since 2010 have been relatively few but I will review them under the various headings used below.

A. Second Married Spouse v. First Children

My earlier papers covered the following cases that fall under this category:

- *Saugestad v. Saugestad*, 2008 BCCA 38
- *MacKinlay v. MacKinlay Estate*, 2008 BCSC 994
- *Bridger v. Bridger Estate*, 2006 BCCA 230, affirming 2005 BCSC 269
- *Sikora v. Sikora Estate*, 2009 BCSC 195

- *Allchorne v. Allchorne*, 2005 BCSC 104
- *Chan v. Lee*, 2004 BCCA 644, varying 2002 BCSC 678

In ***Miller v. Miller***, 2011 BCSC 29, the plaintiff was the second wife of the testator. The couple married in their late 70s/early 80s and were married for 4 years by the time of the testator's death. They had no marriage agreement. The testator had three sons with his first wife. The wife had assets of $15,000 at the time of her husband's death.

One year before his death, with the knowledge of his wife, the testator executed a will, leaving his estate to his two sons and disinheriting one. The testator wrote a memorandum setting out his reasons for his dispositions but nothing was said about why no provision was made for his wife. The testator left funds of about $169,000 to the wife through assets falling outside of his estate, with her knowledge.

The major asset owned by the testator was a home he owned with his first wife. He expressed a wish that his wife be allowed to stay in the house for sufficient time for her to relocate. He gave his wife assets, outside of his estate, worth about 25% of his total assets which had a value of approximately $600,000. The wife sought a variation to get 60% of the proceeds from the sale of the house.

The sons argued that her failure to object to the testator's plan was tantamount to an agreement that precluded her from advancing a variation claim. The court rejected this argument.

In assessing the legal obligation to the plaintiff, the court noted that the matrimonial home would be a family asset and subject prima facie to equal division between the spouses. Under the Will, as the wife received only 25% of the assets, the Will operated as if there had been a reapportionment in favour of the husband of 75% of the house. The court considered whether such a reapportionment would be fair under the factors set out in s. 65 of the *FRA*. Because the house was brought into the marriage by the testator and given the other factors, the court held that it would have reapportioned in favour of the husband but not to the extent of 75% but rather 70%. Therefore, to meet the legal obligation of property division to the wife, the court awarded her a further 5% of the estate, or $34,000.

In addition, to meet the full of the legal obligation, the court awarded the wife a lump sum spousal support amount of $20,000.

On the basis that she had suffered some economic hardship and that the legal entitlement was not adequate to allow her to be economically self-sufficient, the court gave her a further sum under the moral obligation and awarded the wife a total sum of $75,000, amounting to approximately 36% of the overall estate.

In ***McLellan v. McLellan***, 2011 BCSC 461, the testator died leaving two adult daughters from his first marriage and his second wife of 14 years. He had an estate worth $1.75 million, all of which was left to his wife, save for $50,000 divided between his two daughters. In addition, the wife also received all of the testator's assets passing outside

the estate, which was worth nearly $1 million. The wife also had her own assets before her husband's death of nearly $1.2 million (pre-tax) at trial and an average annual salary of $284,000, from her franchise investment.

The daughter who received $15,000 brought a wills variation claim. She had, with her common law spouse, assets amounting to over $1.7 million. She was seeking 25% of the value of the estate based on the moral obligation.

The periods of estrangement resulted from the fact that the testator left his first wife after she suffered from a stroke, which left the plaintiff to care for her debilitated mother. Further, the testator married his second wife within days after the divorce was granted from his first wife. The testator and his first wife settled their property claims and the plaintiff did receive a share of her mother's estate on her mother's death.

Both the daughter and the wife's financial circumstances improved after the testator's death and each argued that this to their respective benefit. Neither had financial need.

The court found that the testator's will did not make adequate provision for the plaintiff on the basis that owed his daughter a strong moral obligation, and that any estrangement was largely his responsibility. The varied the will to give the plaintiff $250,000 (approximately 15% of the estate) as a cash bequest.

Second Common Law Spouse v. First Children

My earlier papers covered the following cases that fall under this category:

- *Picketts v. Hall*, 2009 BCCA 329, leave to appeal to SCC ref'd [2009] SCCA No. 389
- *Mazur v. Berg*, 2009 BCSC 1770
- *Lamoureux v. Kalyk*, 2009 BCSC 584
- *McDonald v. Eckert*, 2004 BCSC 323

By reason of the change in the *FLA*, the prior cases involving common law spouse claims under the *WVA* are no longer illustrative of the approach that the court may take in considering the rights of a common law spouse, particularly in relation to the assessment of the legal obligation owed to her/him. Now that property division and support rights are the same as between married and common law spouses, the assessment of the legal obligation should now be the same under the variation provisions of the *WESA*. However, the assessment will proceed under the *FLA* rather than the *FRA* and the outcome of what property division results can now be very different under the new family law regime.

In ***Eckford v. Vanderwood***, 2014 BCCA 261, affirming 2013 BCSC 1729, the testator divided his estate, worth approximately $283,000, by giving 40% each to his two adult children from a previous marriage and 20% to his mother. The testator's common law spouse received nothing under the Will but did receive the testator's half interest in their home by right of survivorship, which half interest was worth approximately $155,000.

The plaintiff spouse became disabled after death and sought a variation. At trial, the judge dismissed the claim, finding that adequate provision had been made for the spouse through the joint tenancy. She appealed on the basis that the court failed to take into account her change in circumstance and increased need.

The court dismissed the appeal, holding that in deciding whether a testator made adequate provision, it is the circumstances existing and reasonably foreseeable at the death of the testator that are relevant. The court found that the spouse' decline in health after the testator's death was not reasonably foreseeable. In view of the competing interests of the testator's children and mother, given the small size of the estate, the trial ruling was upheld.

B. First Children v. Second Children

My earlier papers covered the following cases that fall under this category:

- *Waldman v. Blumes*, 2009 BCSC 1012
- *Pelletier v. Erb Estate and British Columbia Public Trustee*, 2002 BCSC 1158

In ***McBride v. Voth***, 2010 BCSC 443, the court's starting point in variation claims by children against their siblings on the basis that, barring any valid and rational reasons expressed in the will, adult independent children should share equally in their parent's estates. This proposition has been applied and followed in some subsequent cases.

In ***Werbenuk v. Werbenuk Estate***, 2010 BCSC 1678, a son was the sole beneficiary of his father's estate. There was no provision for the four daughters of the deceased who were sisters to the son. One of the daughters, Ms. Derksen, was the only child from the testator's first marriage. In his will, the testator explained that he disinherited three of his daughters on the basis that two of them, Patricia and Lorraine, had already received between $20,000 to $30,000 each from him while he was alive, and because his "third daughter" had nothing to do with him while he was alive. He did not give reasons for disinheriting Ms. Derksen.

The court found that all four of the testator's daughters had been involved in his life to varying degrees. On the face of the evidence at trial, the court rejected the testator's assertion that he had given Patricia a $20,000 gift. Although it was established that Lorraine benefited from a $30,000 gift from the testator, the court found that she contributed and cared for her father's needs the most, especially as his health deteriorated. Accordingly, the court held that the testator's reasons for disinheriting his daughters were untrue and irrational, and that he failed to consider his daughters' respective needs and overlooked their contributions to his well-being.

The court analyzed the claim of each child based on their relationship with the testator and their financial need. Beginning with the proposition that each independent child should have an equal share in the estate, the court awarded the child with the least financial need 15% of her father's estate, and the child with the most financial need 23% of her father's estate. The remaining children each received a shared between 20-22% of

the estate. The court took care to ensure that after accounting for financial need, the children would receive as similar amounts as possible.

The ***Laing v. Jarvis Estate***, 2011 BCSC 1082, case is unique in that it deals with a dispute between a testatrix's biological and adopted children. Nevertheless, the outcome was that each child was to be given an equal share in the estate. Here, the plaintiff was the adopted daughter of the testatrix, whose only significant asset was a residence, which was sold for $281,500. The testatrix left everything to her natural son.

The court noted that the will did not provide an explanation for why the plaintiff was excluded. The court did refer to the notes taken by the lawyer who prepared the will, which stated that the plaintiff had had no contact with the testatrix "in years", and had been advanced "lots of money" by the testatrix. However, on the face of other evidence presented at trial, it was established that the testatrix and the plaintiff remained in contact over the years, often by telephone. As such, the court found that there was no valid or rational reason for the testatrix to disinherit the plaintiff. The court directed that both children were to receive an equal half share in the estate.

In ***Gray v Gray***, 2012 BCSC 1310, the testator had an estate worth about $790,000. He left $10,000 to each of the three children from his first marriage, and the remainder to his son from his second marriage. Two sons from the first marriage applied to have the will varied, while the other child from the first marriage settled separately. Both brothers lacked significant assets at the time of trial. One suffered from mental illness and lived in a group home, and the other struggled financially. Both brothers were estranged from the testator at the time of death whereas the son from the second marriage had a strong bond with the testator.

The court noted that in this case, the testator was responsible for his estrangement from his children from the first marriage. The sons of the first marriage had attempted to develop a relationship with their father. Each son made trips to visit his father as the father moved around Nanaimo, Victoria, and Gabriola Island. In contrast, the father never made an effort to visit any of children from his first marriage.

Based on these circumstances, the court found that the estrangement did not negate the testator's moral duty to provide for his children, and that the testator should have actually rectified the lack of emotional and financial support provided to them over the years. Accordingly, the court varied the will, directing that adequate provision would require that half the estate go to the son of the second marriage, and the other half of the estate divided equally amongst the two sons from the first marriage, in addition to the $10,000 they already received.

In ***Scott-Polson v. Lupkoski***, 2013 BCCA 428, affirming *Scott-Polson v. Henley*, 2013 BCSC 247, the mother had nine children (six from her first marriage and three from her second). Of an estate worth $775,000, she gave the three children from her second marriage each a quarter share, with the remaining quarter share split six ways between the children from the first marriage. In her will, the testatrix explained that she wished to give a significantly greater share of her estate to the children of her second marriage at

the expense of the entitlement of the children of her first marriage because most of her wealth was acquired during her second marriage and from her second husband's assets.

In evaluating the moral claim of the children of the second marriage for adequate provision, the court applied the analytical framework set out in *Hall v. Hall,* 2011 BCCA 354, namely, whether the testatrix's reasons for unequal distribution were valid and rational. On the face of the evidence presented at trial, it was well established that the testatrix's wealth was indeed mostly acquired during her second marriage and from her second husband's assets. Accordingly, the court upheld this reason for the unequal distribution made by the will and dismissed the claim for the six children, except that an additional bequest was given to a disabled child who had special needs.

V. AVOIDING VARIATION CLAIMS WITH *INTER VIVOS* TRUSTS

Given that the will is subject to variation, solicitors may be inclined to recommend that an inter vivos trust be used as the succession vehicle. This may be even more the case where there is a blended family and potential for a dispute amongst the family members may be increased.

The law has been relatively clear that it is possible for a will-maker to use an inter vivos trust to prevent a wills variation claim by an adult child. The courts have long stated that an adult child has no claim until after the parent's death and therefore, the parent can arrange his/her affairs such that there are no assets remaining in the estate for a variation without committing a fraudulent conveyance of his/her assets: *Hossay v. Newman* (1988), 22 E.T.R. (2d) 150 (BCSC).

Since *Hossay* (where a trust was not used as the alternate planning vehicle), there have been a number of more cases that have upheld the use of a trust that has had the ultimate effect of precluding a variation claim by stripping the estate of any or any significant assets.

- *Mordo v. Nitting*, 2006 BCSC 1761
- *Mawdsley v. Meshen*, 2012 BCCA 91, affirming 2010 BCSC 1099
- *Easingwood v. Cockroft*, 2013 BCCA 182; affirming 2011 BCSC 1154

In ***Mordo v. Nitting*** *et al*, 2006 BCSC 1761, the mother used a number of planning methods, including an inter vivos trust, to preclude a successful challenge by a son who was the target of disinheritance. The son sought, inter alia, to set the trust aide on the basis that the transfer out of the assets from the mother's estate was a fraudulent conveyance by her as it defeated his variation claims. The court upheld the trust on the basis, inter alia, that the transfer of the assets to it did not violate the *Fraudulent Conveyance Act*, RSBC 1996, c. 163 (the "*FCA*").

In applying *Hossay*, the court held that estate planning to avoid a moral claim due to an independent adult under the then *Wills Variation Act* does not offend the *FCA* and transactions made to further such estate planning are not fraudulent conveyances.

In ***Mawdsley v. Meshen***, 2012 BCCA 91, affirming 2010 BCSC 1099, the common law wife used an alter ego trust to effect her estate plan. The trust arrangements were made with the knowledge of the common law husband 18 years. The couple had no children together and the female spouse had 3 children from two prior marriages. Her wealth was largely from her second husband, with whom she had one child.

She transferred some assets to her children through joint tenancy title; she gave them some outright gifts and she also made them beneficiaries, along with another family member, of the trust into which she settled her business interests. No provision was made for the common law spouse of any assets by any mechanism.

The surviving spouse sued after death to set aside the trust on the basis that it defeated his variation claim and therefore constituted a fraudulent conveyance. to defeat any future wills variation claim by him. In its analysis, the court emphasized that without the intent to defraud someone, as required by section 1 of the *FCA*, then the transaction cannot be characterized as a fraudulent conveyance:

> **Fraudulent conveyance to avoid debt or duty of others**
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> 1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies
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> (a) a disposition of property, by writing or otherwise,
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> (b) a bond,
>
> (c) a proceeding, or
>
> (d) an order
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> is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

The trial judge held that the impugned transactions, including the trust, were not a violation of the *FCA*, as the deceased spouse held no intention to defeat any claim by the surviving spouse. Rather, the deceased did not believe that her spouse would advance any claim and therefore, nothing was done with a fraudulent "intention", which is a necessary requirement to find a violation of the *FCA*.

Interestingly, the court did find that the deceased spouse had failed to meet the moral obligations owed to the surviving spouse. What passed under the will was all awarded to the surviving spouse on the variation claim, although it was not a significant amount of her entire assets.

On appeal, the court considered whether a spouse has standing under the *FCA* to challenge the transfer of assets into an *inter vivos* trust – in other words, is a spouse a "creditor or other" under s. 1 of the *FCA*? The trial judge did not find it necessary to

decide this question, given her conclusion that the deceased did not hold the intention, when she engaged in the planning, to defeat or hinder any claims by the plaintiff. The Court of Appeal held that "creditors and others" in the *FCA* does not include a person who has no claim at the time of the transfer in question. As a variation claim does not arise until the testator's death, then spouses and children are not within the ambit of the persons who get the protection of the *FCA*.

There were some facts in this case that did not favour the plaintiff's claim, including: the deceased and the plaintiff had an agreement between them that they would retain their respective assets and money on their death to provide as they wished; the plaintiff was aware that he was not being provided for in her estate, as he was present for her estate planning; and the plaintiff never questioned her planning.

In ***Easingwood v Cockroft***, 2013 BCCA 182, affirming 2011 BCSC 1154, the creation of the trust was done, not by the testator, but by his attorneys under an enduring power of attorney following the testator's incapacity. The power was general and gave the attorneys the same powers as the testator would have if competent. Again, as in *Mawdsley*, the planning through the use of the trust precluded the surviving wife from effectively pursuing her variation rights as little assets remained in the will on death.

In this case, the surviving wife was aware of the trust planning done by the attorneys and she and the testator had a marriage agreement that provided that they would each retain their assets brought into the marriage and would relinquish any claim to the other's estate. By his death, they had been married for 26 years.

The attorneys justified their creation of the trust on a number of basis, including: there was a real likelihood that one of the attorneys might die before the father, which would have rendered the power of attorney inoperative; they acted on the advice of legal and tax advice in settling the trust and its terms; they did not deprive the testator of his assets during his lifetime and they effectively followed, in the trust, his intended testamentary plan that he had set out in his will. In particular, there was a term in the will that would allow for a "top up" of funds to support the house trust that was given to the spouse in the will.

The court upheld the attorneys' creation of an inter vivos trust that took immediate effect (even though some of the trust terms did not arise until the testator's death) on the basis that they acted in accordance with their fiduciary duties to act in the best interest of the testator. They followed his expressed wishes for the disposition of his estate on his death and the trust prevented the possible invalidity of the power of attorney and permitted a proper and orderly management of the incapable testator's affairs during his lifetime.

The Court of Appeal accepted that the *Mawdsley v. Meshen* decision put to rest the plaintiff's ability to attack the trust under the *FCA*. The plaintiff, on appeal, argued that the settlement of the trust was beyond the powers granted to the attorneys but this was not accepted on the facts of this case, where the trust served the testator's interests. The Court of Appeal did leave open the possibility that certain *inter vivos* trusts created by attorneys could be challenged:

> [54] In reaching this conclusion, I do not put an *inter vivos* trust, fully created, as one beyond challenge by those who consider themselves aggrieved by its creation. Where, for example, a trust created by an attorney has the effect of adding beneficiaries not named in a will, or avoiding a gift established by a will, or disposing of assets where the principal has chosen not to make a will and the estate would be divided as provided in an intestacy, the trust may well be challenged, e.g., under the rubric of the attorney's duty to conform to the intentions of the principal. That is, the issue of breach of fiduciary duty would loom large. All of these questions are live questions, requiring the determination of facts in a particular case.
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> [55] My conclusion on the issue of the validity of an *inter vivos* trust such as this, created by an attorney, putting the principal's assets into the trust, is simply that there is no rule in law prohibiting that creation. Further, as commented in cases such as *Mawdsley*, and *O'Hagan v. O'Hagan*, 2000 BCCA 79 (CanLII), 2000 BCCA 79, 183 D.L.R. (4th) 30, tax planning including "estate freezes" may be prudent and, in the large sense, in the best interests of the principal.

It still remains an open question as to whether an *inter vivos* trust can be used by a testator to defeat the claims of a spouse, where there is no marriage agreement and no potential *FLA* claim at the time of the settlement of the instrument.